

## REMARKS

Applicant thanks the Examiner for the telephone interview of January 9, 2006 during which was discussed the practicality of adding a drawer as disclosed by Fujii to the refrigerated display case disclosed by Wetzel. Additionally, the lack of motivation to modify the refrigerated display case disclosed by Wetzel to add elements of the showcase disclosed by Fujii was discussed.

Claims 1-21 are pending in this application.

Applicant acknowledges that the Examiner has indicated that claims 9 and 10 are allowed.

The Examiner has rejected claims 1, 2, 7, 8, 11-16 and 19-21 as unpatentable over U.S. Patent No. 5,860,289 to Wetzel (hereinafter "Wetzel") in view of US Patent Publication No. 2003/0173876A1 to Fujii et al. (hereinafter "Fujii"). The applicant respectfully disagrees.

In order to establish that any claim is obvious the Examiner must identify 1) all of the claimed elements in the prior art; 2) a reason or motivation to modify or combine these elements to arrive at the claimed invention; and 3) a reasonably likelihood of success. (See M.P.E.P. 2141)

Wetzel may disclose "a cooled air plenum", "a unit cooler" and "a shelf mounted ... below a first cooled air egress passageway in communication with said plenum" as required by claim 1. However, as admitted by the Examiner, Wetzel does not disclose a drawer as required by claim 1.

The Examiner appears to have cited Fujii to illustrate that the use of a drawer as part of a refrigerated showcase was known at the time of the invention. However, Fujii does not disclose a shelf as required by claim 1.

It is submitted that the Examiner has failed to cite documents that, alone or in combination, teach all of the elements of independent claim 1. In particular, claim 1 requires either a drawer positioned below a shelf such that cooled air that spills out of the shelf is received by the drawer or a shelf positioned below a drawer such that cooled air that spills out of the drawer is received by the shelf. Neither Wetzel nor Fujii teach or suggest the use of a drawer positioned below a shelf such that cooled air that spills out of the shelf is received by the drawer. Additionally, neither Wetzel nor Fujii teach or suggest the use of a shelf positioned below a drawer such that cooled air that spills out of the drawer is received by the shelf.

The Examiner is directed to Appeal No. 2005-0812 of the Board of Patent Appeals and Interferences (hereinafter, *Ex parte* Gottling). In particular, the following passage may be found on page 6 of *Ex parte* Gottling:

*“Obviousness cannot be established by combining prior art to produce the claimed invention absent some teaching or suggestion supporting the combination. In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783-84 (Fed. Cir. 1992). The mere fact that the prior art may be modified in the manner suggested by an examiner does not make the modification obvious unless the prior art suggests the desirability of the modification. Id.”*

Applicant was faced with the problem of designing a refrigerated merchandiser that would be suited to marketing produce with a variety of shapes, sizes and packaging modes. It is submitted that a person of ordinary skill in the art, when faced with the same problem, would not turn to a review of refrigerated merchandisers suited to marketing flowers (Wetzel) or bottled liquid (Fujii). In particular, the tall, slender shape of flowers is generally consistent, whether solitary or

bunched and display manner is unlikely to be different for solitary, loose flowers as distinct from bunched flowers. In contrast, while a drawer may be well suited to displaying produce having the irregular shape of loose potatoes, for example, a shelf may be well suited to displaying produce that is grouped together in a package. Additionally, again in contrast to the display and cooling of produce, each item of bottled liquid, as illustrated in Fujii, is of a consistent size and shape and are unlikely to be packaged together for sale.

Furthermore, Wetzel does not provide motivation for the addition of drawers to the disclosed shelving unit nor does Fujii provide motivation for the addition of shelves and cascading cooled air to the disclosed unit of drawers.

Wetzel and Fujii, alone or in combination, simply fail to disclose each of the elements of the invention of claim 1 and fail to provide motivation to arrive at the claimed invention. Withdrawal of the rejection of claim 1, and claims 2, 7, 8, 11-16 and 19-21 dependent thereon, is therefore respectfully requested.

The Examiner has rejected claims 3-5, 6, 17 and 18 as obvious over Wetzel in view of Fujii in further view of Gerweck (3-5), Rainwater (6) and Navarro (17 and 18). It is submitted that none of the further references provide elements of claim 1 missing from the combination of Wetzel and Fujii, as discussed above, or provide motivation to arrive at the claimed invention. Withdrawal of the rejection of claims 3-5, 6, 17 and 18, which are all dependent on claim 1, is therefore respectfully requested.

Generally, it is submitted that refrigerated merchandisers have existed for more than 50 years and that the display of produce for sale, potatoes for example, has occurred for centuries. As such, it is submitted that there existed a long-felt need for an efficient means to maintain the

produce at a consistent temperature and present the produce in more than one packaging mode. Furthermore, the applicant has enjoyed significant commercial success in Canada with products exemplifying the claimed invention. Accordingly, objective analysis clearly supports that the present invention required the requisite ingenuity and was not obvious.

The non-obviousness of the claims on file are further supported by the allowance, in Canada, of claims of a similar scope over Fujii and U.S. Patent No. 6,701,736 to Johnson, among other references in Applicant's corresponding Canadian Patent No. 2,462,992.

Applicant respectfully requests that a timely Notice of Allowance be issued in the case.

Petition is hereby made for a one-month extension of the period to respond to the outstanding Official Action to January 23, 2006. A check in the amount of \$120.00, as the Petition fee, is enclosed herewith. If there are any additional charges, or any overpayment, in connection with the filing of this response, the Commissioner is hereby authorized to charge any such deficiency, or credit any such overpayment, to Deposit Account No. 11-1145.

Wherefore, a favorable action is earnestly solicited.

Respectfully submitted,

KIRSCHSTEIN, OTTINGER, ISRAEL & SCHIFFMILLER, P.C.

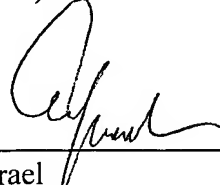
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